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In the Supreme Court of the United States

OCTOBER TERM, 1970

No. 1039

ALBERT TOCCO, PETITIONER

v.

UNITED STATES OF AMERICA

No. 1040

GEORGE NASSE, ROBERT DAVID and ORLAND DAVID, PETITIONERS

v.

UNITED STATES OF AMERICA

No. 1041

HERMAN DAVID, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. No. 1039, App. 1–25) is not yet reported.

JURISDICTION

The judgment of the court of appeals was entered on July 31, 1970. Petitions for rehearing were denied on November 2, 1970. On December 2, 1970, the petitions for writs of certiorari were filed. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

Nos. 1039 and 1040:

1. Whether the evidence was sufficient to show that petitioners were part of a single conspiracy and thus properly subject to a joint trial.

No. 1040:

2. Whether Nasse was prejudiced by the admission of two conversations Herman David had with other conspirators after Nasse's arrest.

3. Whether the trial court's instruction permitting the jury to infer guilty knowledge from possession of recently stolen property violated due process.

4. Whether Nasse's voluntary statements to an F.B.I. agent were properly admitted into evidence, and whether the prosecutor's incorrect references thereto in closing argument constituted prejudicial error.

No. 1041:

5. Whether the admission into evidence of the fruits of searches and seizures conducted of petitioner Herman David's home and truck requires reversal of his conviction.

STATEMENT

The five petitioners were among thirteen defendants charged in a thirty-count indictment returned in the United States District Court for the Northern District of Illinois.[1] They were charged and convicted of conspiracy to transport stolen vehicles in interstate commerce, to camouflage these automobiles, and to prepare counterfeit State titles for use in selling the automobiles in violation of 18 U.S.C. 2312, 2313, 2314 (Count 1, App. 20–22[2]) and (except for petitioner Nasse) of various related substantive offenses.[3] The court of appeals affirmed in an opinion which recounts

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[1] Cobb, Wright, and Abraham (named in the indictment as co-conspirators) were severed and testified on behalf of the government. Abraham later pleaded guilty to the conspiracy count, and one substantive count. Four others who stood trial with petitioners (Geidens, Peter Nasse, McGurk and Nash) were acquitted. Joseph Intarola (who has not filed a petition) was found guilty of conspiracy and four substantive counts.

[2] "App." refers to the joint appendix filed in the court of appeals; "T." preceded by volume number designates the seventeen-volume transcript of trial; "R." refers to the transcript of proceedings on a motion to suppress, heard on July 12, 1966. All of these records are on file with the Clerk.

[3] Herman David was found guilty of nineteen substantive counts and sentenced to concurrent terms of five years' imprisonment on all counts and fined $1,000 on the conspiracy count; Robert and Orland David were convicted on eight substantive counts and sentenced to concurrent terms of five years' imprisonment and fined $1,000 on the conspiracy count; Albert Tocco was found guilty on one substantive count and sentenced to concurrent terms of three years' imprisonment and fined $1,000 on the conspiracy count; George Nasse was sentenced to three years' imprisonment and fined $1,000.

the evidence and discusses the issues in some detail (Pet. 1039, App. 1–25). We set forth the relevant facts in the appropriate sections of the Argument.

ARGUMENT

1. Petitioners in Nos. 1039 and 1040 (Nasse, Robert and Orland David, and Tocco) contend that the evidence showed separate and distinct conspiracies and that therefore there was prejudicial joinder under the rule of *Kotteakos* v. *United States*, 328 U.S. 750.

(a) The evidence relating to the scheme showed that between April and September, 1962, petitioner Herman David received eight cars, stolen from the Chicago, Illinois area. He camouflaged them by remarking the engine numbers and drawing up counterfeit Indiana or Illinois titles (see App. 88–94, 215–216, 217, 240–241; 1 T. 59–152; 9 T. 1529–1561; 10 T. 1843). He and his sons—petitioners Orland and Robert David—then transported the cars to George Nasse, a car dealer in Youngstown, Ohio. Nasse aided in the process of disguising the cars by replacing the counterfeit titles with legitimate Ohio titles (App. 59–64, 263–264; 12 T. 2156–2157). Nasse and acquitted co-defendant Rudy Geidans thereafter drove the cars to an auto auction in Pennsylvania, where they sold them (App. 91–93; 1 T. 116–124, 145). Nasse and Geidans were arrested by Ohio authorities on September 27, 1962 while trying to sell one of the stolen cars (App. 94–97; 1 T. 153–180).

After Nasse's arrest, the operation continued in the same general pattern. New dealers were brought in to

sell the cars: Frank Scarcelli (Counts 8–12), Willard Lasky (Counts 13–16), and Joseph Iatarola (Counts 18–20, 22–30). With each dealer, the same arrangement of altering the engine numbers and using counterfeit titles to obtain legitimate ones was employed.

Scarcelli, a used car salesman in Joliet, Illinois, testified as a government witness that in late 1962, he was approached by petitioners Robert and Orland (Joe) David with a proposition to wholesale cars. Soon thereafter, the Davids began delivering stolen cars, together with spurious titles, to Scarcelli.[4] As had Nasse before him, Scarcelli obtained legitimate titles; he sold the stolen cars first in Missouri and then California. Scarcelli turned over the proceeds arising from these sales directly to the David brothers.[5]

In the fall of 1963, the David brothers induced Willard Lasky, a used car salesman in Chicago, to sell cars for them. They told him the cars were "absolutely perfect," that "even the secret numbers were covered on the automobile and that there was no way to tell that it was a legitimate or illegitimate automobile" (App. 143–144; 5 T. 803–804). The same general

[4] There was evidence that the die stamp used to alter the engine numbers on the Nasse cars was the same stamp used to alter the engine numbers on cars delivered to and sold by Scarcelli (Pet. 1039, App. 7).

[5] Early in 1963, after Scarcelli had been interviewed by the Federal Bureau of Investigation, the David brothers told him they knew of his meeting with the F.B.I. They said they could monitor F.B.I. calls over a radio, and threatened to bomb his house and kill him if he should talk (App. 113–123; 2 T. 389; 3 T. 477). A radio similar to the one referred to by the Davids when threatening Scarcelli was found in the garage of the house belonging to Orland David at the time of his arrest.

approach was employed as before in the resale of these automobiles (App. 143–149; 5 T. 797–835).

In late May 1964 one George Steger asked petitioner Tocco to obtain a Cadillac for his secretary (App. 158; 6 T. 1020–1021). On June 4, 1964, at Tocco's request, Ervin Hager—who testified that he supplied stolen cars to Herman David (App. 289–292; 13 T. 2341–2349)—stole a Cadillac in Elkhart, Indiana at Tocco's request (App. 292–293; 13 T. 2362–2364).[4] The serial number on the car was changed (App. 73). Hager then obtained a counterfeit Indiana title from Herman David and delivered both car and title to Tocco (App. 293; 13 T. 2364–2368). Tocco paid him and delivered the automobile to Steger's secretary in Illinois (App. 158; 6 T. 1020–1021). In June 1964, Steger was interviewed by the F.B.I. Tocco thereafter inquired as to what had occurred, advising Steger that "they" had learned of the interview and that the F.B.I. did not have "anything on anybody if you don't say anything" (App. 162; 6 T. 1033; Pet. App. 20–21).

The conspiracy continued until some time in November 1965, when most of the conspirators were arrested.

(b) As the foregoing recital shows, the evidence established an elaborate yet unitary scheme. Herman

[4] There was evidence that about three weeks earlier Hager and Tocco had stolen another Cadillac in Illinois (App. 292; 13 T. 2362), and that on May 8, Tocco sold the automobile to Steger accompanied by a counterfeit Indiana title (App. 157; 6 T. 1007–1015). Since this transaction was entirely intrastate it was not charged in the indictment but was admitted to show the intent and pattern used by Tocco (Pet. 1039, App. 20).

David and his sons were at the core with Nasse, a principal participant in the earlier stages. While Tocco's involvement commenced in 1964, the conspiracy was still a vital ongoing venture. In short, the fact that the membership was not constant, that numerous transactions occurred, or that Nasse and others were arrested before the conspiracy itself terminated does not detract from the fact that this was a single enterprise with a unique pattern of operation known and followed by all participants. Against this factual background, the court of appeals correctly held (Pet. App. 4–6) that the evidence established, not a number of separate conspiracies governed by the rule of *Kotteakos* v. *United States*, 328 U.S. 750, but rather an integrated criminal venture within the doctrine of *Blumenthal* v. *United States*, 332 U.S. 539. Accordingly, it was proper to conduct a joint trial. See also, *James* v. *United States*, 416 F. 2d 467 (C.A. 5), certiorari denied, 397 U.S. 907; *United States* v. *Guanti*, 421 F. 2d 792 (C.A. 2); *United States* v. *Agueci*, 310 F. 2d 817 (C.A. 2), certiorari denied, 372 U.S. 959.

2. Petitioner Nasse was arrested by Ohio State Police on September 27, 1962. At trial, two witnesses (Abraham and Hager) testified to conversations they had with Herman David subsequent to Nasse's arrest. In early 1963, David told Abraham that he had sold cars to "dealers in Ohio" until the dealers "got arrested in another state with hot cars" (App. 263–264; 12 T. 2156–2159). Sometime prior to September 1965, David told accomplice Hager that he intended to contact a dealer in Ohio to whom he had previously de-

livered stolen cars (App. 294; 13 T. 2377). Nasse argues that the admission of these statements violated the rule of *Bruton* v. *United States*, 391 U.S. 123.

Unlike *Bruton*, however, this is not a case involving an inadmissible post-arrest confession of a co-defendant, "powerfully incriminating" and "devastating" in its impact upon the jury. *Bruton*, *supra*, 391 U.S. 135–136. Nor is there any suggestion that by these statements to co-conspirators David was seeking "to shift [the] blame" to Nasse. *Id.* at 136. On the contrary, these were casual references during conversations with confederates with no purpose to falsify and only peripheral relevant to Nasse, who was not named. Indeed, there was ample evidence showing Nasse's role in the conspiracy, without reference to either conversation. Under these circumstances, the trial court's limiting instructions, given on four separate occasions (App. 337–338, 385, 386, 387), that any statements or acts of co-conspirators occurring after September 27, 1962, were not admissible against Nasse, provided a sufficient safeguard to obviate any possible prejudice.[7]

3. Petitioner Nasse challenges the trial court's instruction that possession of recently stolen property, unless satisfactorily explained, is sufficient to support the inference that the possessor knew the property was stolen.[8] This Court and the courts of appeals have con-

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[7] As the court of appeals alternatively found, in the context of this case any error in the admissibility of these statements was harmless beyond a reasonable doubt under the principles of *Harrington* v. *California*, 395 U.S. 250 (Pet. 1039, App. 9–10).

[8] The court's instructions in this regard are set out at Pet. No. 1040, pp. 8–9; see also App. 388–389.

sistently held, however, that the inference embodied in the instruction is a rational reflection of common experience. *E.g., Rugendorf* v. *United States*, 376 U.S. 528, 536–537; *McNamara* v. *Henkel*, 226 U.S. 520, 524–525; *United States* v. *Winbush*, 428 F. 2d 357 (C.A. 6), No. 5668, this Term, certiorari denied, November 16, 1970. Petitioner suggests no justification for reexamination of these settled precedents.

4. F.B.I. agent Leroy Davis testified concerning a meeting he had with petitioner Nasse at the Bureau's office in Youngstown, Ohio, on February 15, 1963, some five months after Nasse's arrest by state authorities. Nasse was not then in custody and voluntarily came to the F.B.I. office (App. 97, 99). Agent Davis nevertheless gave him explicit warnings as to his rights—including the warning that anything he said could be used against him in a court of law—prior to any discussion (App. 97, 99; 1 T. 196; 2 T. 235).*

According to the agent, Nasse spoke freely and denied any involvement with stolen automobiles; he indicated that his records were consistent with his innocence (see App. 99–102). The agent testified that, at this point (App. 102; 2 T. 240):

> I asked him also if he had his checks and other records of these transactions. He told me that they were in the custody of his attorney in Pittsburgh, Pennsylvania. I asked him if he

* The conversation occurred more than three years before *Miranda* v. *Arizona*, 384 U.S. 436, had made such warnings a mandatory prerequisite to custodial interrogation; the trial commenced some three months after the *Miranda* decision. See *Johnson* v. *New Jersey*, 384 U.S. 719.

would make them available. At that time he declined.

The simple fact that Nasse "declined" to produce his records did not, as the petition in No. 1040 contends, amount to a claim of privilege that made it improper for the agent to testify about the conversation. Nasse knew, because of the warnings he had been given, that he had the privilege not to talk, but he voluntarily answered questions in an obvious effort to convince the federal authorities that his involvement was entirely innocent (See Pet. App. 8); he similarly agreed to answer questions on another occasion (App. 102–103). The discussion of the records was part and parcel of this effort, and it was appropriate for the agent to refer to it in relating the entire conversation before the jury.

It is true that in closing argument government counsel misinterpreted the agent's testimony, stating that Nasse had volunteered to produce the records but had never done so. (App. 376). But this isolated remark did not purport to be a comment on Nasse's failure to testify at trial;[10] it simply amounted to a misunderstanding of a portion of Nasse's conversation with agent Davis in which, as we have stressed no privilege was directly asserted or claimed by implica-

[10] The court made explicit in its instructions that the jury "must not draw any inference" from an accused's failure to testify at trial and that he had no burden "to prove his innocence or to produce any evidence" (App. 377, 379).

tion. Reversal should not result from such a minor prosecutorial error in a lengthy trial. This is particularly so in light of the fact that in its instructions the court admonished the jury that "[s]tatements and arguments of counsel are not evidence" (App. 378), and that it was up to the jury to determine the facts "solely from a fair consideration of the evidence" (App. 377).

5. Petitioner Herman David (No. 1041) challenges several searches as being violative of his Fourth Amendment rights.

(a) On September 9, 1965, warrants were issued to search Herman David's truck and house. The supporting affidavit for the search of the truck (App. 434–435) given by F.B.I. agent Robert Zimmerman stated that an informant, who had previously supplied information to the F.B.I. which led to the apprehension of a fugitive, had told him that counterfeit checks drawn on a bank in Gary, Indiana, together with the plates used to print the checks, would be found on the truck, and that David had obtained them from a printer in Griffith, Indiana and then transported them from Chicago Heights, Illinois, to Gary, Indiana. The informant's reference to the truck was corroborated by other F.B.I. agents. As the court of appeals held, this detailed and partially corroborated information was sufficient to constitute probable cause for the issuance of a warrant under *Spinelli* v. *United States*, 393 U.S. 410, 415–418; see also *United States* v. *Ventresca*, 380

U.S. 102; *United States* v. *Pascente*, 387 F. 2d 923 (C.A. 7), certiorari denied, 390 U.S. 1005.

On the same date a state warrant to search David's house was issued to William O'Brien of the Illinois State Police. In his complaint (App. 430–431), Officer O'Brien stated the source of his information as follows (App. 431):

> Complainant has received evidence of this crime from an informant; said informant has previously given complainant evidence of crimes and he has proved himself to be reliable in that arrests and convictions have resulted from information given by him.

The court below found these allegations insufficient to establish probable cause but concluded that the evidence introduced as a result of this search was cumulative and non-prejudicial. The court's conclusion was correct. While the exhibits found in this search showed David to be the source of the counterfeit titles and other paraphernalia used to camouflage the stolen cars, the court of appeals correctly pointed out (Pet. App. 16–17) that David's role in this regard was fully revealed by evidence wholly independently and in no way deriving from the search. See the testimony of co-conspirators Willard Lasky (App. 149; 5 T. 834); Larry Abraham (App. 262–269, 278–280; 12 T. 2153; 13 T. 2211), James Cobb the counterfeiter (App. 281–285; 13 T. 2278–2298), and Ervin Hager (App. 289–303; 13 T. 2341; 14 T. 2478).[11]

[11] Petitioner Tocco (No. 1039) seeks also to challenge the evidence seized from Herman David's house and truck on Sep-

(b) The search of Herman David's home on November 20, 1965, was permissible as an incident to his arrest under the standards prevailing prior to *Chimel* v. *California*, 395 U.S. 752."

The search extended to the area under the possession and control of petitioner. The magnitude of the conspiracy and the presence of others during the search made the removal and concealment of evidence in the house a real possibility. Under these circumstances, the search was reasonable under the standards of *United States* v. *Rabinowitz*, 339 U.S. 56, and *Harris* v. *United States*, 331 U.S. 145. See also,

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tember 9, 1965. However, he claims neither a possessory interest in David's property nor the violation of his personal right to privacy; he therefore plainly lacks standing. This Court has rejected the notion that co-conspirators and co-defendants have special standing simply by virtue of their status as such. *Alderman* v. *United States*, 394 U.S. 165, 171–172. See also *United States* v. *Bruton*, 416 F. 2d 310 (C.A. 8), certiorari denied, 397 U.S. 1014. *McDonald* v. *United States*, 335 U.S. 451, upon which petitioner Tocco relies is not authority to the contrary since the co-defendant there was a guest at the premises searched. See *Alderman* v. *United States*, *supra*, 394 U.S. at 173 n. 7. There is no contention here that Tocco had any similar status.

" The arrest occurred eight days after the indictment was issued. The delay was occasioned by the need to coordinate arrests in Indiana, Ohio, and Illinois of ten of the defendants in order to prevent flight and destruction of evidence. The time lapse does not indicate, as petitioner contends, that his arrest was delayed in order to serve as a pretext for the search. The statement of the F.B.I. supervisor in a general briefing the night before the arrest that the arresting agents were to search for contraband and instrumentalities of the crime incident to the arrest (App. 417–421, 423; R. 82–147) was simply a statement of the then prevailing law.

Lyon v. *United States*, 416 F. 2d 91 (C.A. 5), certiorari denied, 396 U.S. 1023.[13]

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petitions for writs of certiorari should be denied.

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JANUARY 1971.

[13] The issue whether *Chimel* should apply to cases pending on direct appeal at the time of that decision is currently before the Court in *Hill* v. *California*, No. 51, this Term, and *Williams* v. *United States*, No. 81, this Term. Accordingly, the Court may wish to defer passing upon the petition in No. 1041 until those cases are decided.

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